

) **BEFORE THE CHIEF PROCUREMENT OFFICER**
)

DECISION

CASE No. 2009 - 135

)

)

)

)

POSTING DATE:

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Service Solutions Corporation (SSC). With this best value bid (BVB), the Materials Management Office (MMO) attempts to procure janitorial services for The Citadel. After seeking offers, MMO posted an intent to award to GCA Services Group, Inc. (GCA). In its letter, SSC protested MMO's notice of intent to award to GCA alleging that GCA was nonresponsive to various requirements of the BVB. During the hearing SSC alleged that GCA was non-responsible as well.

On October 21, 2009, the CPO conducted a hearing to resolve the matter. Appearing before the CPO were SSC, represented by Elizabeth Crum, Esq; GCA, represented by Michael Barfield, Esq.; The Citadel, represented by Mark Brandenburg, Esq.; and MMO, represented by John Stevens, State Procurement Officer.

NATURE OF PROTEST

The letter of protest is incorporated herein by reference.

FINDINGS OF FACT

The following dates are relevant to the protest:

1. On June 30, 2009, MMO issued the BVB. [Ex. 1]

2. On July 16, 2009, MMO and The Citadel conducted a pre-bid conference.
3. On July 23, 2009, MMO issued Amendment # 1. [Ex. 2]
4. On August 6, 2009, MMO opened the bids received. The bids were reviewed by Richard Brinkley, MMO Procurement Manager, and the price portion of the offers was tabulated as follows:

<u>Bidder</u>	<u>Bid Amount</u>
GCA	\$1,101,802.80
Defender Services	1,107,145.20
SSC	1,166,000.00
Cleaning Solutions & Supplies, LLC	1,258,774.00
Southern Management	1,274,939.18
The Budd Group	1,318,596.00
Diversco	1,721,500.00
WFF Facility Services	1,928,784.00
Sodexo	2,178,022.00
CNR Restorations Group	2,684,273.99
LT Services, Inc.	2,943,200.98
KQ Services, Inc.	3,979,692.24
[Ex. 4]	

The composite scores assigned after evaluation were as follows:

<u>Bidder</u>	<u>Total Score</u>
GCA	470.00
Defender Services	401.55
SSC	437.50
Cleaning Solutions & Supplies, LLC	404.60
Southern Management	432.25
The Budd Group	395.70
Diversco	331.00
WFF Facility Services	316.35
Sodexo	320.75
CNR Restorations Group	210.65
LT Services, Inc.	273.30
KQ Services, Inc.	179.05
[Ex. 5]	

5. On August 31, 2009, MMO posted its intent to award to GCA. [Ex. 6]

PROTEST ALLEGATIONS

In its letter, SSC alleged that GCA was not responsive to the requirements of the BVB. SSC stated as follows:

As that company [GCA] failed to respond completely to several requirements outlined in RFP #5400000987, including:

“Section IV

4. *A copy of the latest three (3) years of your company’s current annual report or certified financial statement prepared by a Certified Public Accountant, indicating financial capability to furnish services as specified.*

The EBITDA statement submitted by GCA in response to the above request may not accurately reflect the company’s financial position and strength, whereas audited financial returns from the company’s public auditors (Grant Thornton) would.

Section V

2. *Your most current financial statement, financial statements for your last three fiscal years, and information reflecting your current financial position. If you have audited financial statements meeting these requirements, you must provide those statements.”*

GCA did not provide audited financial statements from a certified public accountant as required. We are certain that GCA has the required audited financial statements as we have verified their inclusion in other proposals reviewed by our corporate officers.

“Section IV

1. *All offerors are required to complete and submit Attachment H – Contractors Questionnaire with their bid. Failure to comply with this request may deem your offer as non responsive.*

Attachment H, Question 10:

List on-site manager’s experience for the past five (5) years. (use attached sheets as necessary)”

GCA failed to name a proposed on-site manager for The Citadel; instead stating that they will select one after the contract begins.

“Section IV

2. *Provide a statement on the offeror’s approach and plan to comply and implement CCAP standards.”*

GCA failed to address the CCAP standards in a statement as required.

“Section IV

3. *Cost Cutting Ideas: Due to tight budget restraints by the State of South Carolina, The Citadel request each offer to provide recommended cost saving ideas. The ideas are to be verifiable, quantitative and practical. Offers are to provide potential cost saving dollars and provide reasoning behind the recommendation.”*

While GCA offered some cost cutting ideas, they failed to quantify any related savings in their proposals as requested.

“Section V

4 *Stable Work Force –*

What is the configuration of the staff contractor would use to perform the services for this contract (i.e. how many supervisors, lead workers, and workers would be assigned.)

GCA did not provide a staffing chart or breakdown of staffing positions, hours, shifts, etc as required.

It is apparent GCA did not include all required documentation in proper order in its Proposal, and therefore:

It should have failed the mandatory qualifications section of the RFP, and their bid determined non responsive. At that point, the next highest scoring vendor should have received the intent to award.”

WITHDRAWAL OF PROTEST ISSUES

During the hearing, SSC withdrew its following allegations:

1. *“Section IV*
 4. *Provide a statement on the offeror’s approach and plan to comply and implement CCAP standards.”*

GCA failed to address the CCAP standards in a statement as required.

and,

2. *“It is apparent GCA did not include all required documentation in proper order.”*

The remaining allegations proceeded.

MOTION TO DISMISS

During the hearing, MMO and GCA made motions asking the CPO to dismiss allegations raised by SSC at the hearing that GCA was also a non-responsible bidder. Specifically, MMO argued that the responsibility issue was not raised in the protest letter. The CPO held ruling on the motions in abeyance and proceeded with the hearing in order to rule on the motion with a full understanding of the issue.

Section 11-35-4210(2)(b) of the South Carolina Procurement Code (the Code) states “[a] protest pursuant to subsection (1)(b) must be in writing and... a protest...must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. Further, the Panel has noted that protestants must “state their grievance with enough specificity to put all parties on notice of the issues to be decided...” *In re: Protest by J&T Technology, Inc.*, Case No. 1987-3. The Panel also found that the larger the solicitation, “the more specific a protestant will need to be to state its grievance and give notice of the issues of protest.” *In re: Protest of NBS Imaging Systems, Inc.*, Case No. 1993-16. Therefore, a protestant cannot raise allegations at the hearing if they were not in its protest letter.

A responsible bidder “means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” [S.C. Code Ann. §11-35-1410(6)] Therefore, responsibility goes to one’s capability to do the job, which was not raised in the protest letter. Here, SSC’s protest letter only raised issues concerning non-responsiveness. Therefore, the CPO agrees that MMO’s motion to dismiss must be granted. Accordingly, SSC’s responsibility allegations are dismissed.

CONCLUSIONS OF LAW

SSC alleged in its letter that GCA was not responsive to various requirements of the BVB. For all BVBs, the Code requires that the “[a]ward must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid.” S.C. Code Ann. §11-35-1528(8)] A responsive bidder is defined as “a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.” S.C. Code Ann. §11-35-1410(7)] Simply stated, the Code requires that any bid that does not comply with the material requirements of an invitation for bids must be rejected.

The first two issues address GCA’s alleged failure to provide required financial information. In its first allegation, SSC alleged that GCA’s bid was not responsive to the requirement that bidders submit, “[a] copy of the latest three (3) years of your company’s current annual report or certified financial statement prepared by a Certified Public Accountant, indicating financial capability to furnish services as specified.” [Ex. 1, Part IV, Information for Offerors to submit, Item 4] GCA submitted an audited EBITDA (Earnings Before Interest, Taxes and Depreciation Statement) for 2006, 2007, and 2008. However, SSC alleged that “[t]he EBITDA statement submitted by GCA in response to the above request may not accurately reflect the company’s financial position and strength, whereas audited financial returns from the company’s public auditors (Grant Thornton) would.”

Curiously, the BVB unnecessarily restated the requirement that bidders submit financial information, but this time it stated the requirement differently. It required that bidders submit, “[y]our most current financial statement, financial statements for your last three fiscal years, and information reflecting your current financial position. If you have audited financial statements meeting these

requirements, you must provide those statements.” Regarding this requirement, SSC alleged “GCA did not provide audited financial statements from a certified public accountant as required. We are certain that GCA has the required audited financial statements as we have verified their inclusion in other proposals reviewed by our corporate officers.”

Since these two requirements are redundant, they will be addressed collectively. Both clauses require the same information - that bidders submit adequate information for the state to evaluate each bidder’s ability to perform the tasks specified. Richard Brinkley, MMO Procurement Officer, testified that, in his opinion, SSC provided enough information to meet the requirement. The EBITDA statement submitted by GCA provided a three year audited evaluation of GCA’s sales and operations. However, SSC argues that the EBITDA statement is inadequate because it does not include the remaining schedules typical for financial statements such as a balance sheet to reflect assets, liabilities and retained earnings. SSC contends that other statements are critical in order to determine if GCA is financially fit to complete the contract.

Although it is correct that the EBITDA statement omits certain information typical for a complete set of financial statements, the CPO wonders aloud why the State should need so much such financial information for this procurement of janitorial services. Essentially, this information is relevant primarily to the State’s determination of whether GCA is responsible or not, which as previously stated was not raised in the protest letter and has been dismissed.¹

Financial position should typically remain a matter of responsibility, not responsiveness. The financial information could have been requested later during a determination of responsibility. However, the State chose to make delivery of financial information by bidders a requirement of the BVB making submittal of the financial information a matter of responsiveness. Therefore, SSC argues

that GCA was not responsive because GCA did not submit full financial statements or annual reports for three years. SSC further argues that the EBITDA statement is inadequate to satisfy the requirement of the BVB.

Even if one accepts SSC's argument that GCA was not responsive in these regards, the Code authorizes the state to determine that certain omissions by a bidder are minor informalities or irregularities and either waive the omissions or seek additional information from that bidder. A minor informality or irregularity "is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders." [S.C. Code Ann. §11-35-1520(13)] The failure of a bidder to furnish financial statements is a minor informality. [S.C. Code Ann. § 11-35-1520(13)(i)] According to the Code, "[t]he procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State." [S.C. Code Ann. § 11-35-1520(13)]

Mr. Brinkley could have waived the omission or allowed GCA to cure it. Mr. Brinkley did neither, but stated that he was satisfied with the EBITDA statement submitted by GCA. The the CPO determines that GCA's omission of complete financial statements is, at most, a minor informality under the Code and can be waived. Therefore, SSC's allegations in this regard concerning responsiveness are denied.

In the third protest issue, SSC alleged "GCA failed to name a proposed on-site manager for The Citadel; instead stating that they will select one after the contract begins." The BVB states, "[a]ll

¹ The CPO acknowledges that financial strength was a subset of one award criterion, Information Required to be Submitted by Offerors, but the points allocable to this subset were minimal. Moreover, GCA was not allowed to provide, and the state

offerors are required to complete and submit Attachment H – Contractors Questionnaire with their bid. Failure to comply with this request may deem your offer as nonresponsive.” [Ex. 1, Part IV, #6] The matter was addressed again when bidders were instructed to “[l]ist on-site manager’s experience for the past five (5) years. (use attached sheets as necessary)” [Ex. 1, Attachment H, #10]

GCA complied by completing Attachment H, Contractor’s Questionnaire, by asserting that “GCA will provide an experienced site-based manager and supervisors who will become an integral part of The Citadel community” [Ex. 8]² and writing “GCA will implement a customized comprehensive transition and start up plan commencing 30-45 days prior to takeover managed and led by **Senior Regional Manager Chad Van Slooten**” [Ex. 8, Executive Summary] and providing a biography of Mr. Slooten’s education and career with GCA. [Ex. 8, Key Personnel] GCA also committed “GCA will assign a qualified and experienced Account Manager at The Citadel, to oversee the college-wide custodial operation. The GCA Account Manager at The Citadel will possess the following characteristics in his/her role at the College.” GCA continued to commit to The Citadel certain minimum characteristics for its account manager.

SSC argues that GCA’s submission is so inadequate as to be nonresponsive because GCA indicates that Mr. Van Slooten will be an interim on-site manager and failed to list a permanent manager. While the CPO agrees that the evaluators might have desired the name and career bio of the permanent on-site manager (the CPO would have anyway), the BVB did not require any certain duration of on-site manager’s stay at The Citadel. In fact, no bidder can guarantee the State that its on-site manager will remain with the bidder’s company indefinitely. Therefore, GCA’s bid was responsive to this requirement. GCA honestly disclosed its intentions, and the evaluators still rated GCA highest overall. Accordingly, this allegation is denied.

did not evaluate, any information after opening.

In the fourth protest issue, SSC alleged “GCA offered some cost cutting ideas; but they failed to quantify any related savings in their proposals as requested.” Regarding cost savings ideas, the BVB required that “[d]ue to tight budget restraints by the State of South Carolina, The Citadel requests each offer to provide recommended cost saving ideas. The ideas are to be verifiable, quantitative and practical. Offers are to provide potential cost saving dollars and provide reasoning behind the recommendation.” [Ex. 1, IV, #9]

In response, GCA provided three response items:

- GCA will purchase the newest, most innovative, and most energy efficient equipment and supplies available in the industry. These do not only save on energy costs but also benefit the environment by minimizing water use.
- Reduction of staff during Cadet furloughs
- Staff and administration “cooperation”

[Ex. 8. Cost Savings Ideas For the Citadel]

SSC argued that this list is inadequate and is not verifiable or quantitative and that GCA did not estimate potential cost savings dollars. The CPO acknowledges that GCA could have been more thorough in its response, but disagrees that it makes GCA’s bid non-responsive. First, GCA provides sufficient information to be responsive. Second, regarding the first cost saving proposal above, GCA wrote, “[t]oday’s auto scrubbers use 50% less water than older models from just five years ago.” While this information may not quantify potential savings to the degree SSC expects, it is verifiable, quantitative, and can be used by The Citadel to estimate potential cost savings. Therefore, it is responsive, and this allegation to the contrary is denied.

In the fifth protest issue, SSC alleged, “GCA did not provide a staffing chart or breakdown of

² The proposal by GCA consists of approximately 2 inches of unnumbered pages making it almost impossible to direct the reader quickly to the pages quoted.

staffing positions, hours, shifts, etc as required.” As the basis of its protest, SSC makes reference to the question in the BVB, “What is the configuration of the staff contractor would use to perform the services for this contract (i.e. how many supervisors, lead workers, and workers would be assigned.)” [Ex. 8, Section V, Qualifications] In response, GCA provided bios for its upper level corporate personnel, commitments regarding the characteristics of its on-site manager, a transition plan, and GSA’s 2009 Training Plan (23 pages). SSC argues that submittal was too inadequate to be responsive. While the CPO notes that the submittal does not provide everything one might envision, the CPO disagrees with SSC’s claim that this rendered GCA’s bid non-responsive. The CPO finds that sufficient information was offered by GCA to be responsive. Therefore, this allegation is denied.

DETERMINATION

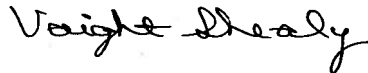
Regarding the repeated requirement for financial statements in this solicitation, the CPO takes exception with the use of financial wherewithal as an evaluation factor in this BVB. To require financial information necessary for the state to determine a bidder’s capability to perform any contract is necessary only in order to determine a bidder’s responsibility. However, use of that financial information in a subjective evaluation should be limited to procurements that require deep capital investment. When the State seeks bids for insurance coverage, construction of a multi-million dollar building or development of a state park, which are all procurements that require deep financial pockets, a subjective evaluation of financial wherewithal is completely understandable. When the State seeks bids for janitorial service at The Citadel, it is an overt attempt to avoid the statutory requirement to make a determination of responsibility prior to every award. In other words, it just overstates the importance of financial standing for this contract.

Unlike bids received in response to an invitation for bids, in evaluating offers received in response to a best value bid or a request for proposals, procurement managers realize that each

offeror's submitted information will be critiqued and scored subjectively by a committee of evaluators. Therefore, in determining offeror responsiveness, procurement managers should accept offers that are minimally responsive to the requirements and allow the evaluators to score each submittal.

Mr. Brinkley determined that GCA submitted adequate information to be minimally responsive. The CPO agrees. For its own benefit, GCA might have been more thorough, but GCA submitted a bid which "conforms in all material respects" to the BVB.

For the reasons stated above, the protest is denied.



R. Voight Shealy
Chief Procurement Officer
for Supplies and Services

November 2, 2009

Date

Columbia, S.C.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).